

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

May 27, 2011

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii 96813

PSF: 11HD-074

HAWAII

Withdrawal from General Lease No. S-3849, Withdrawal from Governor's Executive Order No. 1398 and Reset-Aside to the State Department of Transportation for Public Highway Purposes; Issuance of Immediate Construction and Management Right-of-Entry to the Department of Transportation, Kaohe 3rd, Hamakua, Hawaii; TMK: 3<sup>rd</sup>/ 4-4-15:04 por., 08 por. & 14 por.

CONTROLLING AGENCY:

Division of Forestry and Wildlife

APPLICANT:

Department of Transportation, State of Hawaii

LEGAL REFERENCE:

Section 171-11, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of the Government Lands of Kaohe situate at Kaohe 3rd, Hamakua, Hawaii, identified by Tax Map Keys: 3<sup>rd</sup>/ 4-4-15:04, 08 & 14, as shown on the attached map labeled Exhibit A.

TMK/ ZONING/ AREA/ ENCUMBRANCE:

TAX MAP KEY 3 <sup>rd</sup> /	ZONING		PARCEL AREA (Acres)	ENCUMBRANCE
	LUC	CZO		
4-4-15:04	Conservation	Unplanned	7,152.233	Governor's Executive Order No. 1398 for Public Hunting Ground and Game Reserve; Land Office Deed No. S-28,756 to Verizon Hawaii, Inc. for utility easement

TAX MAP KEY 3 <sup>rd</sup> /	ZONING		PARCEL AREA (Acres)	ENCUMBRANCE
	LUC	CZO		
4-4-15:08	Conservation	Unplanned	3,130.330	Governor's Executive Order No. 1398 for Public Hunting Ground and Game Reserve; General Lease No. S-3849 for the Pohakuloa Training Area; Land Office Deed No. S-28,756 to Verizon Hawaii, Inc. for utility easement
4-4-15:14	Conservation	Unplanned	23.801	Governor's Executive Order No. 1398 for Public Hunting Ground and Game Reserve

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

TMKs 3<sup>rd</sup>/ 4-4-15:04 (Parcel 4), 4-4-15:08 (Parcel 8) and 4-4-15:14 (Parcel 14) are part of the Kaohe Game Reserve under Governor's Executive Order No. 1398 dated October 16, 1950 and managed by the Division of Forestry and Wildlife. Parcel 8 is also a portion of the premises leased to the United States of America under General Lease No. S-3849 for the Pohakuloa Training Area. Parcel 14 is a segment of the old Saddle Road alignment.

PURPOSE:

The Department of Transportation is requesting the set-aside of the subject land for public highway purposes.

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

The final Environmental Impact Statement (EIS) was announced in the Federal Register on September 3, 1999 and in Hawaii's Office of Environmental Quality Control's Environmental Notice on September 8, 1999. A Record of Decision (ROD) finalized on October 30, 1999 presented the selection of the recommended alternatives by the agencies and formalized the mitigation commitments. The Governor accepted the EIS on November 12, 1999. In September 2006, the Department of the Army (DA) requested that a new W-7 alignment be considered because the original W-3 alignment in the EIS essentially divided in two the DA's recently acquired Keamuku Maneuver Area (lands acquired from Parker Ranch). On December 8, 2007, a Supplemental EIS (SEIS) Preparation Notice was published in the Environmental Notice for the Mamalahoa Highway to Milepost 42 section of Saddle Road. An ROD for the SEIS was signed in

February 2010, and notice of its availability was published on February 23, 2010 in the Environmental Notice. The Governor accepted the SEIS by letter dated September 1, 2010, and the acceptance was published in the Environmental Notice on September 23, 2010.

APPLICANT REQUIREMENTS:

- 1) Process and obtain subdivision at Applicant's own cost, if required;
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost;
- 3) Obtain the written concurrence of the Division of Forestry and Wildlife to the withdrawal of the subject land from Governor's Executive Order No. 1398;
- 4) Obtain the written concurrence to the United States of America to the withdrawal of the subject land from General Lease No. S-3849; and
- 5) Comply with the conditions of Conservation District Use Permit HA-3559.

REMARKS:

The Saddle Road realignment project is a partnership of federal and State agencies to upgrade and modernize Saddle Road from its junction with Mamalahoa Highway in South Kohala to milepost 6 in South Hilo, a distance of approximately 48 miles. The purpose of the project is to provide safe and efficient travel between East and West Hawaii. After completion of construction, the State Department of Transportation (DOT) will operate and maintain the new highway. Three phases of the realignment have been completed extending between mileposts 19 and 41, and a fourth phase is under construction between mileposts 11 and 19 in South Hilo.

By memorandum dated April 28, 2011, DOT's Right-of-Way Manager, Dean K. Yogi, requested the set-aside of the State lands within the "Saddle Road – West Side Milepost 42 to Mamalahoa Highway" to DOT, as well as the issuance of an immediate construction right-of-entry to DOT. The Federal Highway Administration – Central Federal Lands Highway Division (CFLHD) is the lead agency for project design and construction, and will be acting on DOT's behalf under the right-of-entry. The memorandum explains that DOT's legal possession of the right-of-way needs to be secured by the end of May 2011 in order to comply with federal contracting requirements for the project.

The Milepost 42 to Mamalahoa Highway section of the project will diverge from the old Saddle Road alignment between the 41 and 42 mile markers and extend in a westerly direction to intersect Mamalahoa Highway at approximately its 14 mile marker. See Exhibits B and C. A portion of the new alignment will overlap the old Saddle Road. A small portion of the old Saddle Road outside the new alignment will be obliterated, and

the old Saddle Road will be realigned at its eastern end to form a T-intersection with the new Saddle Road between the 41 and 42 mile markers of the new alignment.<sup>1</sup>

DOT's memorandum indicates that a right-of-way map showing the total area for the project is currently in the process of being finalized, reviewed and approved. Due to the time constraints involved, DOT submitted the most recent maps available, 95% Preliminary Design Plans dated January 28, 2011. DOT explains that it will forward right-of-way maps to DLNR as soon as they are available. DOT's application for the set-aside indicates that project will cross approximately 1.4 miles of State lands primarily on Parcel 8, but partly on Parcels 4 and 14, and that the estimated area of the set-aside is approximately 30 acres, the final area to be determined by survey.

Based on staff's review of the Preliminary Design Plans, it appears that the new highway right-of-way is generally planned to be approximately 200 feet wide, although the width increases in certain areas, up to approximately 275 feet, to accommodate grading, drainage or similar road engineering features.

As indicated above, DOT's requested right-of-way through the State parcels is located partly within lands leased to the United States of America for the Pohakuloa Training Area pursuant to General Lease No. S-3849. The lease contains a provision that allows the State to "grant rights or privileges to others not inconsistent with the terms of this lease affecting the whole or any portion of the demised premises," subject to the prior approval of the United States. Staff has included an Applicant requirement that DOT secure the written concurrence of the United States to the withdrawal of the right-of-way from the lease. DOT provided staff with a document dated May 10, 2011 signed by the United States that appears to satisfy this requirement. DOT will also need to obtain the written concurrence of the Division of Forestry and Wildlife (DOFAW) for the withdrawal of the right-of-way from Executive Order No. 1398 that established a Public Hunting Ground and Game Reserve over the subject lands. Staff has received a preliminary confirmation from DOFAW that it has no objection to the withdrawal.

DOT's requested right-of-way will also encompass portions of existing utility lines that run parallel to Saddle Road in this area. Hawaiian Electric Light Company, Inc. (HELCO) has two sets of electric transmission lines and utility poles on Parcels 4 and 8. The earlier transmission line (69KV) was erected in 1957 before the environmental assessment and conservation district laws came into effect. The later line (138 KV) was erected in 1987 after a Final EIS and pursuant to Conservation District Use Permits HA-1554, HA-1554A, and HA-1904. Easements for these transmission lines and supporting

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<sup>1</sup> General Lease No. S-3849 expressly excluded the old Saddle Road from the description of the premises leased to the United States for the Pohakuloa Training Area. At its meeting of December 11, 2009, Item D-6, the Board approved an amendment of General Lease No. S-3849 to incorporate the bypassed sections of the old Saddle Road between mileposts 30.1 and 41.4 as part of the lease premises. Similar action may be required for the obliterated portions of the old Saddle Road outside of the right-of-way for the new alignment in the Milepost 42 to Mamalahoa Highway segment.

guy wires and anchors were approved by the Board at its meeting of January 24, 1986, Item F-2, as amended at its meeting of April 12, 1996, Item D-6. However, the easement instrument has not issued because HELCO has not provided staff with completed surveys of the transmission lines. Staff will consult with HELCO to determine whether the surveys and easement instrument can be finalized before right-of-way is formally set aside to DOT.

Additionally, by Land Office Deed (LOD) No. S-28,756 dated June 14, 2005, the Board granted Verizon Hawaii, Inc. a perpetual easement to maintain a fiber optic cable on the HELCO utility poles. The set-aside to DOT of the road right-of-way will need to be made subject to these utility easements. The realignment project may require the relocation of utility poles within the right-of-way for the new alignment. Any relocation of poles outside of the surveyed easement corridor for LOD No. S-28,756 will require a corresponding amendment to the easement instrument.<sup>2</sup>

Conservation District Use Permit HA-3559, covering the Saddle Road improvements between mileposts 42 and Mamalahoa Highway, imposes a number of conditions on DOT. Staff has made the compliance with the permit a condition of the approval of the subject set-aside and right-of-entry.

An immediate construction and management right-of-entry for the new road right-of-way will allow DOT and its contractors to conduct necessary surveys and commence construction. There is a possibility of unexploded ordnance (UXO) being located in the project area. DOT and CFLHD explain that they have protocols in place to deal with UXO in cooperation with the U.S. Army Corps of Engineers. The right-of-entry will include notice of the potential presence of UXO in the project area and will require an acknowledgment that DOT and its contractors enter the area at their own risk.

Staff notes that the Preliminary Design Plans designate a number of areas outside of the new road right-of-way (but adjacent to it) as "Temporary Construction Easement" areas. DOT explains that it will need access to these areas during construction of the new highway, but that they will not be a part of the right-of-way upon completion of construction. Staff believes that the best approach to granting access to these areas is through a construction right-of-entry that will last until completion of construction and acceptance of the highway by DOT.

The right-of-entry form DLNR uses includes a standard provision allowing for the unilateral termination of the right-of-entry at any time by the Chairperson. DOT and CFLHD point out that the standard provision could be problematic because CFLHD will enter into binding contracts for construction of the highway and requires some assurance that the right-of-entry will not be revoked without cause during construction. DOT and CFLHD have proposed the following language:

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<sup>2</sup> Staff will provide copies of this submittal to HELCO and Hawaiian Telcom, Inc. (successor-in-interest to Verizon Hawaii, Inc.) when this matter is confirmed on the Board's agenda.

Either party may terminate this right-of-entry at any time during the term hereof by providing the other party thirty (30) calendar days prior written notice of the intent to cancel; except that highway construction activities required by contracts to which DOT and/or CFLHD are parties and which are in effect at the time of termination by DLNR shall be allowed to proceed to completion.

Staff understands DOT's and CFLHD's need for a degree of certainty in this regard, and is including a recommendation below that the proposed termination language be included in the right-of-entry in lieu of the standard provision.

In light of the environmental impact statements prepared for the realignment of Saddle Road in this area, staff is of the opinion that the highest and best use of the subject land is for public highway purposes. Staff further believes that the proposed use fully utilizes the requested land.

No comments were solicited on the proposed disposition because the proposed project has been through the HRS Chapter 343 Environmental Impact Statement process.

RECOMMENDATION:

That the Board, subject to Applicant fulfilling the Applicant Requirements above:

1. Approve the withdrawal of the lands required for the Saddle Road – West Side Milepost 42 to Mamalahoa Highway Project from General Lease No. S-3849, United States of America, Lessee, subject to the following:
  - A. The standard terms and conditions of the most current withdrawal from lease form, as may be amended from time to time;
  - B. Review and approval by the Department of the Attorney General; and
  - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
2. Approve of and recommend to the Governor issuance of an executive order withdrawing the lands required for the Saddle Road – West Side Milepost 42 to Mamalahoa Highway Project from Governor's Executive Order No. 1398, and subject to the following:
  - A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
  - B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;

- C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Approve of and recommend to the governor the issuance of an executive order setting aside the lands required for the Saddle Road – West Side Milepost 42 to Mamalahoa Highway Project to the Department of Transportation under the terms and conditions cited above, which are by this reference incorporated herein, and subject further to the following:
- A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
  - B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Grant an immediate construction and management right-of-entry to the Department of Transportation, its consultants, contractors, and/or persons acting for or on its behalf, onto the subject lands under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:
- A. The standard terms and conditions of the most current construction and management right-of-entry form, as may be amended from time to time, except that the termination language shall provide as follows: "Either party may terminate this right-of-entry at any time during the term hereof by providing the other party thirty (30) calendar days prior written notice of the intent to cancel; except that highway construction activities required by contracts to which DOT and/or CFLHD are parties and which are in effect at the time of termination by DLNR shall be allowed to proceed to completion";
  - B. The right-of-entry is effective upon the Department of Land and Natural Resources' receipt of a countersigned right-of-entry form and shall continue until the executive order document is issued;


- C. The Department of Land and Natural Resources reserves the right to impose additional terms and conditions at any time if it deems necessary while this right-of-entry is in force.
5. Grant an immediate construction right-of-entry to the Department of Transportation, its consultants, contractors, and/or persons acting for or on its behalf, onto all "Temporary Construction Easement" areas noted on the Preliminary Design Plans dated January 28, 2011 for the Saddle Road – West Side Milepost 42 to Mamalahoa Highway improvements, as may be amended from time to time, on the subject lands under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:
- A. The standard terms and conditions of the most current construction and management right-of-entry form, as may be amended from time to time, except that the termination language shall provide as follows: "Either party may terminate this right-of-entry at any time during the term hereof by providing the other party thirty (30) calendar days prior written notice of the intent to cancel; except that highway construction activities required by contracts to which DOT and/or CFLHD are parties and which are in effect at the time of termination by DLNR shall be allowed to proceed to completion";
- B. This right-of-entry is effective upon Land Board approval and shall continue until completion of construction and acceptance of the project by the State Department of Transportation; and
- C. The Department of Land and Natural Resources reserves the right to impose additional terms and conditions at any time if it deems necessary while this right-of-entry is in force.

Respectfully Submitted,

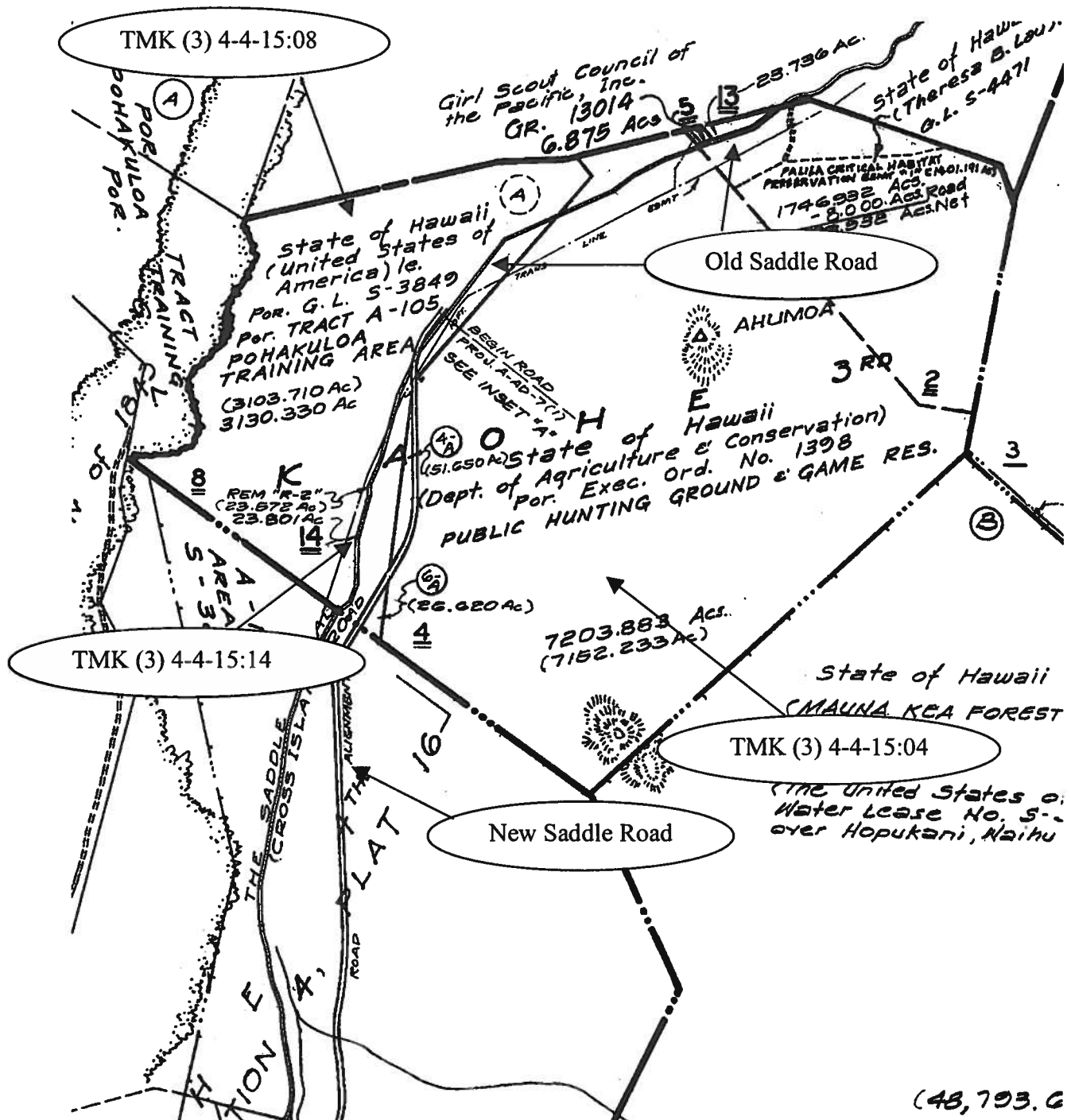


Kevin E. Moore  
District Land Agent

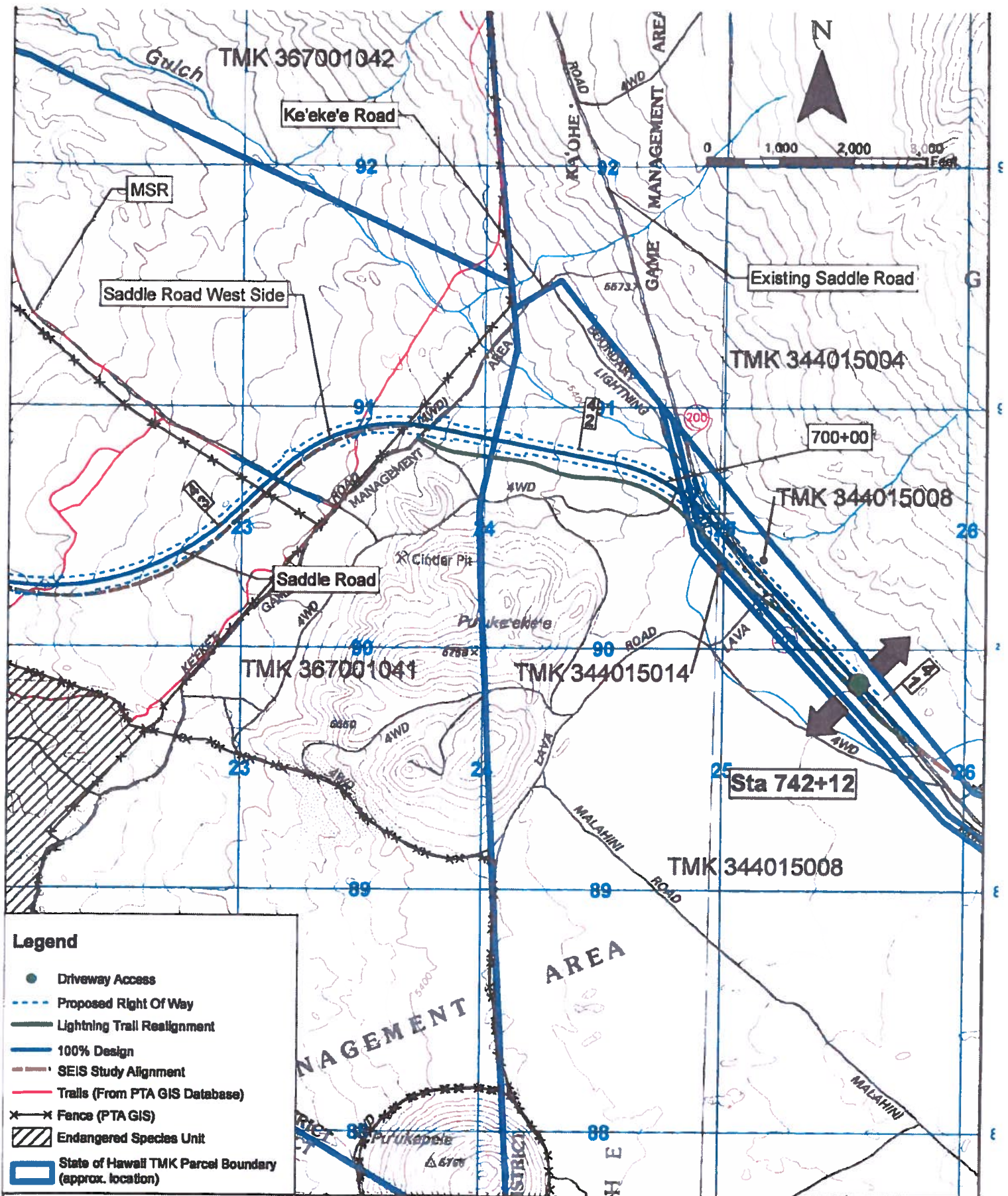
APPROVED FOR SUBMITTAL:

  
William J. Aifa, Jr., Chairperson









# Saddle Road West Side

MAY 2011

SCALE 1:20,000

**EXHIBIT C**  
**SSFM**  
 INTERNATIONAL

SSFM International  
 501 Summer Street, Suite 620  
 Honolulu, Hawaii 96817